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CASE NO. 83-2089
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

LARRY W. BURDGICK,
Petitioner,
STATE OF FLORIDA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI TO THE DISTRICT
COURT OF APPEAL OF FLORIDA, FOURTH
DISTRICT.

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QUESTIONS PRESENTED

WHETHER THE SUPPRESSION OF EVIDENCE WAS
PROPERLY DENIED, AND WHETHER THIS ISSUE
PRESENTS A SUBSTANTIAL FEDERAL QUESTION?

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MEMORANDUM FOR THE SECRETARY OF DEFENSE
SUBJECT: CHINESE COMMUNIST ARMY - CHINESE TROOPS
IN SOUTHERN LAOS AND A POSSIBLE THREAT

RE: STATUS INFORMATION AUTHORITIES
SUBJ: CHINESE TROOPS IN LAOS

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Fla.R.App.P. 9.030
(a)(2)(A)(3)

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1 STATEMENT OF THE CASE

Respondent accepts petitioner's statement of the facts to the extent that it presents an accurate, non-argumentative recitation of proceedings in the state trial court, with the following additions and/or clarifications. (References will be made to the transcript of the hearing on the motion to suppress using the symbol "T.")

Officer Henry E. Devlin testified that the Port St. Lucie police had had conferences within the department concerning the unoccupied area west of town being used as a landing strip for airplanes and as a delivery point for narcotics into the country (T 11, 12-13). He explained that there was a painted circle in the middle of the intersection of Parr Drive and Port St. Lucie Boulevard which could be observed from

the air and was used as a landmark (T 11-12). It was in this area that he saw the vehicles and the people on the night of January 7, 1981 at approximately 9:15 p.m. (T 13-14). There had also been reports of cattle slaughtering, cattle theft and property damage in that area (T 17-18). On a prior occasion Devlin had been called to that area as a backup to another officer who had found flashlights placed in the center of the road which were being used to guide in a plane (T 23-24). After he saw the people and the vehicles on the night of January 7, 1981, Devlin alerted other officers on a scrambler channel of a police radio; the scrambler channel was used because of the possibility of drug smuggling (T 16-17). Port St. Lucie police officer Charles Sutton received the call from Devlin.

(T 30). Sutton testified that the circle area had been identified as a possible cite for drug trafficking by either air or land (T 29). As he approached the area, he could see a van, an automobile and the four defendants (T 32-34). Sutton stood by his marked police vehicle, identified himself as an officer (T 34) and asked the men to come to the center of the road (T 35) since he was alone at the time and wanted to find out what they were doing in that area at that time (T 80). Two of the men ignored his request. One of them walked twice to the side of the road and placed something in the weeds, and the other remained at the rear of the van, apparently attempting to conceal himself or items unknown to Sutton at the time, and eventually came forward very hesitantly only when ordered to do

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so (T 38-39, 78-79).

Officer Sutton asked the men individually and as a group what they were doing in the area, and none of them responded (T 42, 71). Sutton then went to the weeded area where he found an air to ground aircraft transceiver with an antenna and a microphone attached to it, five strobe lights, and a twenty-five caliber automatic pistol (T 42-43). Sutton also saw another transceiver and several walkie-talkie radios on the floor of the van (T 45-46). Based on his training and experience, his knowledge of the circle area, and the items which he found, Sutton believed that the men were planning to contact something in the air from that location (T 43-44). Sutton then arrested all four men for loitering and prowling (T 47-48). Another officer arrived and assisted in

advising all of the defendants of their rights (T 46). The officers remained in the area with the four defendants, and approximately one hour and ten minutes after Sutton first encountered them (T 57), he heard a low-flying plane approach (T 48). Sutton gave the pilot landing instructions using the transceiver (T 51). The persons inside the plane were never apprehended, but over 1,000 pounds of methaqualone tablets were found inside the plane (T 52).

REASONS FOR DENYING THE WRIT

THE SUPPRESSION OF EVIDENCE WAS PROPERLY DENIED, AND THIS ISSUE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

Petitioner argues that his arrest for loitering and prowling was illegal, and that any evidence derived therefrom should have been suppressed. In his statement of the issue, he inadvertently implies that the evidence was admitted at trial. Of course, since petitioner pled nolo contendere, there was no trial. At any rate, respondent maintains that the facts of this case support the validity of the arrest and the denial of suppression.

The constitutionality of Florida's loitering statute was upheld by the Florida Supreme Court in State v. Ecker, 311 So.2d 104 (Fla.), cert. denied sub nom. Bell v. Florida, 423 U.S. 1019

(1975). The version of the statute construed in Ecker, § 856.021, Fla. Stat. (1973), is identical in number and language to the statute in effect at the time suppression was sought in the instant case, and remains unchanged today. See § 856.021, Fla. Stat. (1979 and 1983). The court in Ecker noted that the statute had been patterned after the Model Penal Code and that the question of its constitutionality "requires a delicate balancing between the protection of the rights of individuals and the protection of individual citizens from imminent criminal danger to their persons or property." Id. at 107.

The court rejected a challenge to the statute based on vagueness and overbreadth, borrowing the words of this Court in Terry v. Ohio, 392 U.S. 1, 21 (1968), by specifying that "'the police

officer must be able to point to (3781) specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' a finding that a breach of the peace is imminent or the public safety is threatened" in order to justify an ~~an~~ ¹⁰⁰⁰² arrest for the offense of loitering.

Id. at 109. The requisite facts and inferences were clearly present in the instant case.

The statute states that it is "unlawful for any person to loiter or prowl in a place, at a time or in a manner not usual for law-abiding individuals, under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity." The statute also lists among the circumstances which may be considered in determining whether

such alarm is warranted the fact that the person "manifestly endeavors to conceal himself or any object." § 856.021 (1) & (2). In the instant case, both Officers Devlin and Sutton testified that the area where they encountered petitioner was an unoccupied, rural area which was a suspected landing site for planes involved in drug trafficking. The police had also had reports of cattle slaughtering and theft, and property damage in the same area. The defendants in this case were found at 9:30 p.m. with two vehicles in a remote area. At the beginning of the encounter, one of the men ignored the officer's request to come to the center of the road, and instead walked two times to hide items in a weeded area along the side of the road. Another of the men also ignored the officer, and appeared to be attempting

to conceal objects inside the van. In the course of the encounter, Officer Sutton determined that the concealed items were transceivers, strobe lights, walkie-talkie radios and a twenty-five caliber automatic pistol. In light of his experience and the police knowledge of the use of the area for drug trafficking, petitioner cannot credibly argue that Officer Sutton could not point to specific and articulable facts which reasonably warranted his alarm. Perhaps that is why petitioner does not address all of the facts in his argument.

Petitioner also alleges in his brief that the defendants "were held for over two hours, having been placed face down in the street under the drawn guns of the police." Here again, the facts do not support petitioner. Officer Sutton arrived at the scene at 9:30 or 9:35 p.m.

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(T 56), and the arrests occurred at 10:33 p.m. (T 54). The plane landed approximately one hour and ten minutes after Sutton's arrival at the scene (T 57). Part of that time was spent gathering the defendants after two of them ignored the officer's request to come to the center of the road, and surveying the scene, during which the transceivers and other items were seen in plain view in the weeded area along the side of the road and through the windows of the van (T 118-119). In short, respondent maintains that the facts of this case do not support petitioner's claim of illegality, and therefore, the issue presented here does not pose a substantial federal question.

II

FLORIDA'S LOITERING STATUTE IS NOT UNCONSTITUTIONALLY VAGUE.

Petitioner argues that § 856.021 is unconstitutionally vague in light of this Court's recent opinion in Kolender v. Lawson, ___ U.S. ___, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). Respondent disagrees. A review of the Florida statute (set forth in the appendix to this brief) in comparison with the California statute at issue in Kolender, 75 L.Ed.2d at 906 n.1, will demonstrate that the Florida statute is considerably more detailed than the California statute.

Furthermore, respondent respectfully maintains that disposition of this issue by this Court is premature. In Watts v. State, 447 So.2d 271 (Fla. 2nd DCA 1983), the Second District Court of Appeal of Florida rejected a challenge to the facial constitutionality of § 856.021 which was predicated on this Court's decision in Kolender. The appellate

court held that while some of the reasoning relied upon in State v. Ecker, supra, has been disapproved in Kolender, the Florida statute "is so much more definitive than the California statute as to render the result in Ecker still valid." Id. at 272. For example, the Florida statute applies to persons loitering or prowling "in a place, at a time or in a manner not usual for law-abiding individuals . . .," while the California statute applied to every person who "loiters or wanders upon the streets or from place to place without apparent reason or business . . .".

After the second district's decision in Watts, the defendant in that case successfully requested review by the Florida Supreme Court pursuant to a provision of the Florida appellate rules which allows the court to assume discre-

tionary jurisdiction to review decisions of district courts of appeal which expressly declare valid a state statute.

See Fla.R.App.P. 9.030(a)(2)(A)(i). The issue now pending in that case, Watts v. State, FSC Case No. 64,613, is exactly the same issue as that raised here, that is, whether § 856.021 is facially unconstitutional in light of this Court's opinion in Kolender v. Lawson. Oral argument was heard in that case on September 4, 1984. Thus, the Florida Supreme Court will soon be answering the same question now presented to this Court.

In Kolender, this Court emphasized that a facial challenge to a state statute is evaluated in light of any limiting construction that a state court has proffered. 75 L.Ed.2d at 908. Thus, while respondent respectfully maintains that this Court should deny the writ on the

ground raised here, if the Court is nevertheless disposed to entertain the issue, it should not do so at this time.

State v. Ecker was decided by the Florida Supreme Court in 1975, and this Court denied certiorari review that same year. If the Kolender case occasions a reevaluation of the statute's constitutionality, that reevaluation should take place first in the Florida Supreme Court in the Watts case. If the statute does not survive that proceeding, this case can be returned to the Fourth District Court of Appeal for redetermination in light of Kolender and the Florida Supreme Court's opinion. If the Florida Supreme Court re-affirms the statute's constitutionality, then its opinion will become the authoritative one for purposes of defining the meaning of § 856.021, and petitioner's juris-

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dictional claim can be determined in light of that opinion. See 75 L.Ed.2d at 908 n.4.

For these reasons, along with this brief respondent is requesting by separate motion that if the writ is not denied at this time, consideration of the instant petition should be deferred pending the Florida Supreme Court's decision in the Watts case.

CONCLUSION

For these reasons, respondent respectfully requests that the instant Petition for Writ of Certiorari to the District Court of Appeal of Florida, Fourth District, be denied.

Respectfully submitted,

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A-1
E 856,021. Fix.Stat. (1979)—Unleashing
of prowling; penalty.

(1) It is unlawful for any person to
leash or prowl in a place, at a time or
in a manner not usual for law-abiding
individuals, under circumstances that

A P P E N D I X
warrant a just and reasonable
alarm or immediate concern for the
safety of persons or property in the
vicinity.

(2) Among the circumstances which may
be considered in determining whether
such alarm or immediate concern is
warranted is the fact that the person
takes flight upon appearance of a law
enforcement officer, refuses to identify
himself, or manifestly endeavors to
conceal himself or any object. Unless
flight by the person or other circum-
stance makes it impractical, a law
enforcement officer shall, prior to any

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§ 856.021, Fla.Stat. (1979) Loitering
or prowling; penalty.-

(1) It is unlawful for any person to loiter or prowl in a place, at a time or in a manner not usual for law-abiding individuals, under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity.

(2) Among the circumstances which may be considered in determining whether such alarm or immediate concern is warranted is the fact that the person takes flight upon appearance of a law enforcement officer, refuses to identify himself, or manifestly endeavors to conceal himself or any object. Unless flight by the person or other circumstance makes it impracticable, a law enforcement officer shall, prior to any

arrest for an offense under this section, afford the person an opportunity to dispel any alarm or immediate concern which would otherwise be warranted by requesting him to identify himself and explain his presence and conduct. No person shall be convicted of an offense under this section if the law enforcement officer did not comply with this procedure or if it appears at trial that the explanation given by the person is true and, if believed by the officer at the time, would have dispelled the alarm or immediate concern.

(3) Any person violating the provisions of this section shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.